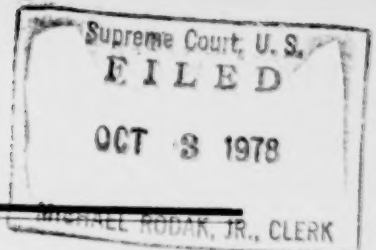


No. 78-203



In the Supreme Court of the United States

OCTOBER TERM, 1978

LANDON B. SNAPP, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

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**MEMORANDUM FOR THE UNITED STATES
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Petitioner contends that he was entitled to a lesser-included offense instruction.

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on 22 counts of unlawful distribution of a controlled substance, in violation of 21 U.S.C. 841(a)(1), and of conspiracy to commit that crime, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of four years' imprisonment and two years' special parole on three of the substantive counts. On the remaining counts, petitioner was sentenced to four years' imprisonment and two years' special parole, but the sentences were suspended on the condition that petitioner surrender his medical license and not apply for its return or practice

medicine during the five-year term of probation. The court of appeals affirmed per curiam on May 1, 1978 (Pet. App. A).¹

The evidence at trial showed that petitioner, a licensed physician, sold prescriptions for Didrex, a Schedule III controlled substance that can cause mood and emotional changes (Tr. 888) and can lead to drug dependency (Tr. 929), to persons who had received only minimal physical examinations (see, e.g., Tr. 223). Often one person would pick up prescriptions from petitioner for a number of other persons who were not present and had never been examined by petitioner (see, e.g., Tr. 224-226, 303). The pharmacy where most of the prescriptions were filled was the biggest customer for Didrex in central and western Tennessee, purchasing more of the substance than any single hospital, clinic, or wholesale drug company (Tr. 806). Didrex prescriptions constituted almost 60% of the prescriptions filled by that pharmacy during one six-month period, and all but one or two of its Didrex prescriptions during that period had been written by petitioner (Tr. 826).

Petitioner claims that the district court erred in refusing to give a lesser-included offense instruction (Pet. App. B) because the proof that he had written prescriptions for Didrex for an improper medical purpose could have supported a conviction for dispensing a Schedule III drug without a proper prescription, which is punishable as a misdemeanor under 21 U.S.C. 829(b), 842(a)(1) and

¹On May 25, 1978, Mr. Justice Stewart extended petitioner's time to petition for a writ of certiorari to and including June 30, 1978. The petition was filed on July 5, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court.

(c)(2)(A),² in addition to supporting a felony conviction under 21 U.S.C. 841.³ See *United States v. Moore*, 423 U.S. 122, 135-138 & nn.12, 13 (1975). The court of appeals correctly rejected this contention.

²21 U.S.C. 829(b) provides in pertinent part:

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act * * * may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act * * *.

21 U.S.C. 842 provides in pertinent part:

(a) Unlawful acts

It shall be unlawful for any person—

(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title * * *.

(c) Penalties

* * * * *

(2)(A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than \$25,000, of both.

³21 U.S.C. 841 provides in pertinent part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance * * *.

(b) Penalties

Except as otherwise provided in section 845 of this title

It is well established that a "lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone v. United States*, 380 U.S. 343, 350 (1965). See also *United States v. Bishop*, 412 U.S. 346, 361 (1973); *United States v. Thompson*, 492 F. 2d 359, 362 (8th Cir. 1974). In this case there was no disputed factual element necessary to convict for dispensing a Schedule III controlled substance under 21 U.S.C. 841 but unnecessary to convict under 21 U.S.C. 842. The issuance of a prescription without a legitimate medical purpose constitutes dispensing under both 21 U.S.C. 841 and 21 U.S.C. 829, and 21 U.S.C. 842(c)(2)(A) (the misdemeanor provision of Section 842) sets forth the same scienter requirement as does 21 U.S.C. 841(a). Indeed, petitioner's proposed instruction (Pet. App. B) merely informed the jurors that, if they acquitted him of the Section 841 violation charged in the indictment, they should then consider whether he was guilty of a violation of Sections 829 and 842; it did not set forth any difference between the two offenses in respect to the quantum of proof necessary for a conviction.⁴ Accordingly, the district court properly rejected petitioner's request to give the instruction.

any person who violates subsection (a) of this section shall be sentenced as follows:

* * * * *

(B) In the case of * * * any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than \$15,000, or both.

⁴Petitioner observes (Pet. 6) that in *United States v. Moore, supra*, 423 U.S. at 135-137, the Court reserved the question whether a physician could be prosecuted under 21 U.S.C. 842 for having

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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violated the provisions of 21 U.S.C. 829 with respect to the issuing of prescriptions. But even if petitioner could have been charged under Section 842, that would suggest only that Sections 841 and 842 overlap to some extent, not that one crime is a lesser-included offense of the other. In such circumstances, the government has discretion to choose which statute to use. See *United States v. Bishop, supra*, 412 U.S. at 361; *United States v. Beacon Brass Co.*, 344 U.S. 43, 45 (1952).